A **FUTURE GROWTH SDN BHD & ORS**

v.

KOPERASI PEMBANGUNAN DESA & ORS

B COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
CLEMENT SKINNER JCA
ABDUL AZIZ RAHIM JCA
[CIVIL APPEAL NO: S-01-137-2011]
C 20 DECEMBER 2013

CONTRACT: *Specific performance - Breach of undertaking - Application for - Alienation of land - Sabah Limitation Ordinance, Sch. Item 95 - Whether action time-barred - Whether period of limitation*
D *extended by acknowledgements - Whether continuing breach of contract - Whether dividends payable could be set off against claim for compensation for breach of undertaking which was time-barred - Sabah Limitation Ordinance, s. 19*

E ***CIVIL PROCEDURE:*** *Action - Limitation of action - Application for specific performance - Breach of undertaking - Alienation of land - Sabah Limitation Ordinance, Sch. Item 95 - Whether action time-barred - Whether period of limitation extended by acknowledgements - Whether continuing breach of contract - Whether dividends payable could be set off*
F *against claim for compensation for breach of undertaking which was time-barred - Sabah Limitation Ordinance, s. 19*

The first appellant was a subsidiary of the second appellant while the third appellant was originally wholly-owned by the first respondent. In 1994, the third appellant owned 20,000 acres of
G agriculture land. The third appellant ran into financial difficulties and approached the second appellant for assistance. A restructuring of the third appellant was proposed whereby the first appellant agreed to purchase 70% of the shares in the third appellant. On 17 April 1995, the first appellant and the first
H respondent entered into a sale of shares agreement whereby cl. 3(i)(b) makes it a condition precedent that the first respondent would procure an irrevocable and unconditional undertaking from the Sabah Government to alienate, within three years from the date of the sale of shares agreement, 15,000 acres of land to a
I company Newco (later to be the third appellant) for oil palm cultivation. On 2 August 1995, the second respondent issued a letter of undertaking addressed to the first appellant. On

7 September 2004, the first appellant transferred its 70% shares in the third appellant to the second appellant. The Sabah State Government, however, did not alienate the 15,000 acres of land to the first appellant. On 17 March 2010, the first and second appellants commenced this action by way of an originating summons. The third appellant and the third respondent were joined as parties. The appellants' claim was for specific performance of the letter of undertaking and damages flowing from the respondents' breaches including loss of profit, opportunistic losses and loss of interest. The respondents resisted the appellants' claim on the ground that the appellants' action was time-barred under Item 95 of the Schedule to the Sabah Limitation Ordinance. The first respondent also made a counter-claim in the sum of RM36,148,575 payable to it by way of dividends declared in the third appellant. The High Court found that the appellants' action was time-barred as it was not brought within six years from the date on which the 15,000 acres of land was to be alienated *ie*, by 17 April 2004. The High Court had, however, allowed the first respondent's counter-claim as he found that the first and second appellants had no right to set-off the dividends payable to the first respondent against a claim for compensation for breach of undertaking which was already time-barred. Dissatisfied with the said decision, the appellants appealed. The issues that arose were, *inter alia,* (i) whether limitation had set in; (ii) whether the first respondent was an agent of the second and third respondents for the purposes of s. 19 of the Sabah Limitation Ordinance; (iii) whether the first respondent's counter-claim should succeed or the appellants may exercise their right to set-off and (iv) whether the first respondent ought to indemnify the appellants.

Held (dismissing appeal)
Per Clement Skinner JCA delivering the judgment of the court:

(1) The fact that the appellants were informed on 3 December 2007 that the third respondent would definitely not be alienating the 15,000 acres did not retract in any way from the fact that the third respondent had undertaken to do so on or before 17 April 1998. Therefore, the third respondent was in breach of that undertaking from 17 April 1998 when it failed to alienate the land as promised. Thus, the date on which limitation would set in was 17 April 2004. The

A appellants' action was thus time-barred as it was not brought within six years from the date on which the land was to be alienated. (paras 13 & 17)

(2) The appellants had relied on s. 19 of the Sabah Limitation B Ordinance to submit that there were acknowledegments made by the first respondent as the agent for the second and third respondents, and by the third respondent itself of the third respondent's liability under the letter of undertaking, which had the effect of extending the period of limitation. The C appellants had referred to letters and minutes of meetings dated before and after 17 April 2004. Under s.19 of the Sabah Limitation Ordinance, however, the acknowledgement must be in writing and made before the expiry of the limitation period. Thus, since some of the letters were written after D 17 April 2004, they could not amount to acknowledgements within the meaning of s. 19 of the Sabah Limitation Ordinance. (paras 22 & 25)

(3) The first respondent was a statutory body created by the Koperasi Pembangunan Desa Enactment 1981 and being a E statutory body was a different entity from and did not form part of nor represents the government. The first respondent was a party to the sale of shares agreement. The acts of the first respondent were equivocal and could not be attributed only to wanting to acknowledge the liability of the second and F third respondent under the letter of undertaking. There was nothing in what the first respondent was said to have done which suggested that the first respondent had been 'duly authorised in this behalf' by the second and third appellants. Thus, the first respondent was not an agent of the second G and third respondents within the meaning of s. 19 of the Sabah Limitation Ordinance. (paras 33 & 37)

(4) The appellants could not refer to s. 23 of the Sabah Limitation Ordinance and claim that their suit was not caught H by limitation. Section 23 of the Sabah Limitation Ordinance provides that where there is a continuing breach of contract, a fresh period of limitation begins to run at every moment of time during which the breach continues. However, this was not a case where the third respondent had promised to I perform a continuous act. The third respondent had only promised to perform one act, namely, the alienation of 15,000

acres of land by a certain date. When the third respondent failed to do so, it was in breach of its promise to perform that one act. There was accordingly no continuing breach of contract as alleged by the appellants. (paras 30 & 31)

(5) At the material time when the dividend in the third respondent was declared, the liability under the letter of undertaking was already statute-barred and so there were no liabilities which could be set off (*United Malayan Banking Corporation Bhd v. PTL Marketing Services Sdn Bhd & Ors*; refd). The appellants and the respondents had not agreed nor quantified the amount of compensation to be paid for the alleged liability under the letter of undertaking. Once the dividend was validly declared by the third appellant, it was a debt owed by the company to its members and immediately payable unless it was stipulated in the declaration that the dividend would be payable at a later date. The Judicial Commissioner was correct to grant the first respondent judgment for that sum. (paras 39 & 40)

(6) The 15,000 acres was never alienated to the third appellant or Newco, thus it could not be regarded as an asset of the company. The first respondent's only obligation with regard to the letter of undertaking was to secure the same from the State Government of Sabah, which it had done. There was no provision in the sale of shares agreement which required the first respondent to ensure that the State Government not only issue the letter of undertakings but also ensured that the State Government fulfil its undertaking. There was no basis in law for the indemnity claimed by the appellants. (paras 43 & 44)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah anak syarikat perayu kedua manakala perayu ketiga pada asalnya dimiliki penuh oleh responden pertama. Pada tahun 1994, perayu ketiga memiliki 20 ekar tanah pertanian. Perayu ketiga menghadapi masalah kewangan dan telah berjumpa dengan perayu kedua untuk meminta bantuan. Penyusunan semula perayu ketiga telah dicadangkan di mana perayu pertama telah bersetuju untuk membeli 70% saham dalam perayu ketiga. Pada 17 April 1995, perayu pertama dan responden pertama telah memasuki satu perjanjian jualan saham di mana kl. 3(i)(b) menjadikannya suatu syarat terdahulu bahawa responden pertama akan memperolehi

akujanji yang muktamad dan mutlak daripada Kerajaan Negeri Sabah untuk untuk memberi milik, dalam tempoh tiga tahun dari tarikh perjanjian jualan saham, 15,000 ekar tanah kepada syarikat Newco (yang kemudiannya adalah perayu ketiga) untuk penanaman kelapa sawit. Pada 2 Ogos 1995, responden kedua telah mengeluarkan surat akujanji yang dialamatkan kepada perayu pertama. Pada 7 September 2004, perayu pertama telah memindah milik 70% saham dalam perayu ketiga kepada perayu kedua. Kerajaan Negeri Sabah, walau bagaimanapun, tidak memberi milik 15,000 ekar tanah tersebut kepada perayu pertama. Pada 17 Mac 2010, perayu pertama dan kedua memulakan tindakan ini melalui saman pemula. Perayu ketiga dan responden ketiga telah dijadikan pihak-pihak yang terlibat. Tuntutan perayu adalah untuk pelaksanaan spesifik surat akujanji dan ganti rugi yang berpunca dari pelanggaran responden termasuk kerugian keuntungan, kerugian peluang dan kerugian faedah. Responden menentang tuntutan perayu atas alasan bahawa tindakan perayu adalah dihadkan oleh masa di bawah Item 95 Jadual kepada Ordinan Had Masa Sabah. Responden pertama juga membuat tuntutan balas dalam jumlah RM36,148,575 yang perlu dibayarnya melalui dividen yang diisytiharkan dalam perayu ketiga. Mahkamah Tinggi mendapati bahawa tindakan perayu adalah dihadkan oleh masa kerana tidak dilaksanakan dalam tempoh enam tahun dari tarikh di mana 15,000 tanah ekar sepatutnya diberi milik iaitu sebelum 17 April 2004. Mahkamah Tinggi, walau bagaimanapun, telah membenarkan tuntutan balas responden pertama kerana ia mendapati bahawa perayu pertama dan kedua tidak mempunyai hak untuk menolak dividen yang perlu dibayar kepada responden pertama terhadap tuntutan untuk ganti rugi bagi pelanggaran akujanji yang sudah dihadkan masa. Tidak berpuas hati dengan keputusan tersebut, perayu-perayu merayu. Isu-isu yang timbul adalah, antara lain: (i) sama ada had masa telah ditetapkan; (ii) sama ada responden pertama adalah ejen untuk responden kedua dan ketiga bagi tujuan s. 19 Ordinan Had Masa Sabah; (iii) sama ada tuntutan balas responden pertama harus berjaya atau perayu boleh melaksanakan penolakan dividen; dan (iv) sama ada responden pertama patut menanggung rugi perayu-perayu.

Diputuskan (menolak rayuan)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Fakta bahawa perayu telah dimaklumkan, pada 3 Disember 2007, bahawa responden ketiga tidak akan memberi milik 15,000 ekar tidak menjejaskan dalam apa cara sekalipun fakta bahawa responden ketiga telah berjanji untuk berbuat demikian sebelum atau pada 17 April 1998. Oleh itu, responden ketiga telah melanggar akujanji tersebut dari 17 April 1998 apabila ia gagal memberi milik tanah seperti yang dijanjikan. Oleh itu, tarikh had masa bermula adalah 17 April 2004. Tindakan perayu adalah dihadkan oleh masa kerana ia tidak dilaksanakan dalam tempoh enam tahun dari tarikh tanah itu sepatutnya diberi milik.

(2) Perayu-perayu telah merujuk kepada s. 19 Ordinan Had Masa Sabah untuk menghujahkan bahawa terdapat pengakuan dibuat oleh responden pertama sebagai ejen responden kedua dan ketiga, dan oleh responden ketiga sendiri berkenaan liabiliti pihaknya di bawah surat akujanji, yang mempunyai kesan melanjutkan tempoh had masa. Perayu-perayu telah merujuk kepada surat-surat dan minit mesyuarat yang bertarikh sebelum dan selepas 17 April 2004. Di bawah s. 19 Ordinan Had Masa Sabah, walau bagaimanapun, pengakuan harus dibuat secara bertulis dan dibuat sebelum tamat tempoh had masa. Oleh kerana sebahagian daripada surat telah ditulis selepas 17 April 2004, ia tidak terjumlah kepada pengakuan dalam maksud s. 19 Ordinan Had Masa Sabah.

(3) Responden pertama adalah badan statutori yang dibentuk oleh Enakmen Koperasi Pembangunan Desa 1981 dan sebagai badan statutori, adalah entiti yang berbeza dan tidak menjadi sebahagian daripada serta tidak mewakili kerajaan. Responden pertama adalah pihak kepada perjanjian jualan saham. Tindakan responden pertama mengandungi beberapa makna dan tidak boleh dikaitkan dengan hanya mahu mengakui liabiliti responden kedua dan ketiga di bawah surat akujanji. Tiada apa yang telah dilakukan oleh responden pertama yang menyatakan bahawa responden pertama telah 'diberi kuasa untuk bertindak bagi pihaknya' oleh perayu kedua dan ketiga. Oleh itu, responden pertama bukan ejen responden kedua dan ketiga dalam maksud s. 19 Ordinan Had Masa Sabah.

(4) Perayu-perayu tidak boleh merujuk kepada s. 23 Ordinan Had Masa Sabah dan mendakwa guamannya tidak dihadkan oleh masa. Seksyen 23 Ordinan Had Masa Sabah memperuntukkan bahawa di mana terdapat kemungkiran kontrak yang berterusan, tempoh baru had masa bermula setiap masa di mana pelanggaran berterusan. Walau bagaimanapun, ini bukan kes di mana responden ketiga telah berjanji untuk melakukan tindakan berterusan. Responden ketiga hanya berjanji untuk melakukan satu tindakan, iaitu, pemberian milikan 15,000 ekar tanah sebelum tarikh yang telah ditetapkan. Apabila responden ketiga gagal berbuat demikian, ia telah melanggar perjanjiannya untuk melaksanakan satu tindakan itu. Oleh itu, tiada pelanggaran berterusan kontrak seperti yang didakwa oleh perayu-perayu.

(5) Pada waktu material apabila dividen dalam responden ketiga telah diisytiharkan, liabiliti di bawah surat akujanji adalah dihadkan oleh statut dan oleh itu tiada liabiliti yang boleh ditolak (*United Malayan Banking Corporation Bhd v. PTL Marketing Services Sdn Bhd & Ors*; dirujuk). Perayu dan responden tidak bersetuju dan tidak menjumlahkan amaun pampasan yang harus dibayar untuk liabiliti yang didakwa di bawah surat penguasaan. Apabila dividen itu telah secara sah diisytiharkan oleh perayu ketiga, ia adalah hutang yang terhutang oleh syarikat kepada ahli-ahlinya dan harus segera dibayar melainkan jika ia telah ditetapkan dalam pengisytiharan bahawa dividen harus dibayar pada tarikh yang akan datang. Pesuruhjaya Kehakiman adalah betul apabila memberi responden pertama penghakiman bagi jumlah itu.

(6) Tanah 15,000 ekar tidak diberi milik kepada perayu ketiga atau Newco, oleh itu ia tidak boleh dianggap sebagai aset syarikat. Tanggungjawab responden pertama berkenaan surat akujanji hanyalah untuk menjamin yang sama daripada Kerajaan Negeri Sabah, yang telahpun dilakukannya. Tiada peruntukan dalam perjanjian jualan saham yang memerlukan responden pertama memastikan bahawa Kerajaan Negeri Sabah bukan hanya mengeluarkan surat akujanji tetapi untuk memastikan Kerajaan Negeri Sabah memenuhi akujanjinya. Tiada asas undang-undang untuk tanggung rugi yang dituntut oleh perayu-perayu.

Case(s) referred to:
KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***
KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA ***(refd)***
Padu Ehsan Sdn Bhd v. Binaan Johanesa Sdn Bhd and Perbadanan Kemajuan Negeri Melaka (Garnishee) [1994] 2 CLJ 69 HC ***(refd)***
Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***
United Malayan Banking Corporation Bhd v. PTL Marketing Services Sdn Bhd & Ors [2004] 2 CLJ 152 HC ***(refd)***
Wright v. Pepin [1954] 1 WLR 635 ***(refd)***

Legislation referred to:
Limitation Ordinance 1953, s. 26(2)
Sabah Limitation Ordinance, ss. 19, 23, Schedule Item 95, Item 112

Other source(s) referred to:
Walter Woon, *Company Law*, 2nd edn, 1997, p 614

For the appellants - Douglas Lind (Christopher Chong with him); M/s Lind, Willie, Wong & Chin
For the respondents - Richard Barnes (Hassan Murtasa with him); M/s Shelley Yap

Reported by Suhainah Wahiduddin

JUDGMENT

Clement Skinner JCA:

Introduction

[1] We had earlier heard the appeal of Future Growth Sdn Bhd ("the first appellant"), IOI Corporation Berhad ("the second appellant") and Permodalan Plantation Sdn Bhd ("the third appellant") against the decision of the Kota Kinabalu High Court given on the 28 January 2011. The High Court had dismissed the appellants' action against Koperasi Pembangunan Desa ("the first respondent"), the Ministry of Agriculture and Food Industry (formerly known as the Ministry of Agriculture and Fisheries) ("the second respondent") and the State Government of Sabah ("the third respondent").

[2] The High Court had also allowed the counter-claim of the first respondent in the action.

[3] After hearing the appeal, we dismissed it. These are our reasons for doing so.

A **The Facts**

[4] The first appellant is a subsidiary of the second appellant. The third appellant was originally wholly owned by the first respondent.

B

[5] In about the year 1994 the third appellant owned some 20,000 acres of agriculture land of which some 10,000 acres were planted with cocoa crops. The third appellant ran into financial difficulties and approached the second appellant for assistance. A restructuring of the third appellant was proposed whereby the first C appellant agreed to purchase 70% of the shares in the third appellant. By a letter dated 8 March 1995 the first respondent informed the first appellant that the Sabah State Government had approved the restructuring. On 17 April 1995 the first appellant and the first respondent entered into a sale of shares agreement D for the above purposes.

[6] Clause 3(i)(b) of the sale of shares agreement makes it a condition precedent that the first respondent would procure an irrevocable and unconditional undertaking from the Sabah E Government to alienate, within three years from the date of the sale of shares agreement, 15,000 acres of land to a new company identified as NEWCO (but later to be the third appellant) for oil palm cultivation.

F **[7]** On 2 August 1995 the permanent secretary of the second respondent issued a letter of undertaking addressed to the first appellant in the following terms (translated into English):

> 2. With this, the State Government of Sabah gives an unconditional and irrevocable undertaking to alienate at least G 15,000 acres of land suitable for the cultivation of oil palm in the State of Sabah to NEWCO or PPSB (3rd Appellant) within the period of three (3) years starting from 17.4.95.

[8] Subsequently, on 7 September 2004 the first appellant H transferred its 70% shares in the third appellant to the second appellant.

[9] It is an undisputed fact that the Sabah State Government did not alienate the 15,000 acres of land to the first appellant.

I **[10]** On 17 March 2010 the first and second appellants commenced this action by way of an originating summons. The third appellant and third respondent were joined as parties on 9 August 2010. The appellant' claim is for specific performance of

the letter of undertaking and damages flowing from the respondents' breaches including loss of profit, opportunistic losses and loss of interest.

[11] The respondents resisted the appellants' claim on two main grounds, namely: (a) lack of *locus standi* of the first and second appellants to bring this action; (b) the appellants' action was time barred under Item 95 of the Schedule to the Sabah Limitation Ordinance. The first respondent also made a counter-claim for the sum of RM36,148,575 payable to it by way of dividends declared in the third appellant.

The High Court Decision

[12] The learned Judicial Commissioner did not make any specific finding on the *locus standi* issue but said in the course of his judgment that: "The third defendant' failure to alienate the land to either Newco or the third plaintiff by that date was a breach of that promise which would entitle the plaintiffs and or Newco to sue".

[13] On the limitation issue the learned Judicial Commissioner found that the appellants' action was time-barred as it was not brought within six years from the date on which the 15,000 acres of land was to be alienated ie, by 17 April 2004.

[14] With regard to the first respondent' counter-claim, the learned Judicial Commissioner allowed it as he found that the first and second appellants had no right to set-off the dividends payable to the first respondent against a claim for compensation for breach of undertaking which was already time-barred.

This Appeal

[15] The appellants raised four main grounds in their appeal: (a) the *locus standi* point; (b) whether limitation had set in; (c) whether the first respondent's counter-claim should succeed or the appellants may exercise their right to set-off; and (d) whether the first respondent ought to indemnify the appellants.

The *Locus Standi* Point

[16] In our view the *locus standi* point is a non-issue as the respondents did not file any cross-appeal against what the learned Judicial Commissioner had said regarding the appellants and Newco's entitlement to sue on the third respondent's failure to alienate the 15,000 acres.

A **Whether Limitation Had Set In?**

[17] According to the appellants the limitation point was a non-starter as this was a case of "omission" in that there was an omission by the third appellant to alienate the land it had
B undertaken to. It was contended by the appellants that it was only on 3 December 2007 that they were informed by the first respondent that the third respondent was unable to provide the 15,000 acres of land. It is from this date that time began to run. We do not agree. In our view the fact that the appellants were
C informed on 3 December 2007 that the third respondent would definitely not be alienating the 15,000 acres does not detract in any way from the fact that the third respondent had undertaken to do so on or before 17 April 1998 and therefore the third respondent was in breach of that undertaking from the 17 April
D 1998 when it failed to alienate the land as promised.

[18] The appellants also contended that Item 95 of the Sabah Limitation Ordinance is not relevant as Item 112 is the relevant section. Item 112 states that "For possession of immovable
E property or any interest therein not hereby specifically provided for", the limitation period is 12 years from "when the possession of the defendant becomes adverse to the plaintiff".

[19] We find no merit in this submission. It is clear to us that Item 112 only applies where there is physical land in existence of
F which possession is being claimed because time begins to run from when the possession of the defendant becomes "adverse" to the plaintiff. There can be no adverse possession of land if it does not exist which is the case here.

G **[20]** It was next contended by the appellants that since the respondents had requested for more time to obtain the 15,000 acres of land, time was enlarged and it would be unconscionable and inequitable to now allow the respondents to assert limitation. The appellants say the respondents should be estopped from
H raising limitation (see *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812; [1998] 4 MLJ 651.

[21] We do not agree with the appellants' submissions. Each case is to be decided on its own facts. The evidence shows that the
I respondents were trying to get the 15,000 acres alienated to Newco. We do not think that their trying to do so can be characterised as unconscionable or inequitable conduct. It has not been demonstrated that during the time the respondents were

doing so they had indicated to the appellants that they were not going to insist on their strict legal rights under the Sabah Limitation Ordinance. Accordingly we do not think that estoppel would apply on the facts of this case against the respondents.

[22] The appellants next relied on s. 19 of the Sabah Limitation Ordinance to submit that there were acknowledgements made by the first respondent as agent of the second and third respondents, and by the third respondent itself of the third respondent's liability under the letter of undertaking, which had the effect of extending the period of limitation.

[23] The appellants have referred us to letters and minutes of meetings dated before and after 17 April 2004 (the date on which limitation would set in) where the first, second and third respondents have allegedly acknowledged the third respondent's liability.

[24] We do not agree with the appellants' submissions. The learned Judicial Commissioner devoted a major part of his judgment on this point. A reading of his judgment shows that the learned Judicial Commissioner had correctly identified that under s. 19 of the Sabah Limitation Ordinance the acknowledgement must be in writing and made before the expiry of the limitation period.

[25] The learned Judicial Commissioner also identified the relevant period for acknowledgements to be between 17 April 1998 and prior to 17 April 2004. As far as the second respondent was concerned the learned Judicial Commissioner said the first response from the second respondent was dated 28 July 2008 and subsequently there were several letters dealing with the compensation to be paid to the appellants which were to be set-off against the dividends payable to the first respondent, but the learned Judicial Commissioner said that since these letters were written after 17 April 2004, ie, after the limitation period had set in they could not amount to acknowledgements within the meaning of s. 19 of the Sabah Limitation Ordinance. We find no error in what the learned Judicial Commissioner said. We agree with him that for an acknowledgement to come within the meaning of s. 19, it must be made before the 17 April 2004.

[26] With regard to the appellants' contention that there were "numerous" acknowledgements and admission made by the first respondent as an agent of the second and third respondents, the learned Judicial Commissioner proceeded to consider the

appellants' submissions on the basis that assuming for the sake of argument only that the first respondent was an agent of the second and third respondents, the learned Judicial Commissioner looked at all the letters written between 17 April 1998 and 17 April 2004. During that period the learned Judicial Commissioner found:

(a) two letters dated 8 July 1998 and 14 July 1998 from the third appellant to the Chief Minister of Sabah;

(b) a letter dated 27 July 1998 from the Chief Minister's office to the Pejabat Hasil Bumi;

(c) a letter dated 4 July 2001 from the third appellant to the Chief Minister of Sabah;

(d) a minutes of meeting of the third appellant dated 9 December 2003.

Referring to these items the learned Judicial Commissioner found that none of these letters or documents were from the first respondent. The learned Judicial Commissioner said that the other documents were outside the relevant dates of 17 April 1998 to 17 April 2004 and were not material. We see no error in these findings of fact made by the learned Judicial Commissioner. Neither has it been demonstrated to us that what the learned Judicial Commissioner had said was plainly wrong.

[27] As far as the letters written by the first respondent were concerned, the learned Judicial Commissioner found that there were such letters written during the relevant period between 17 April 1998 and 17 April 2004. They were:

(a) a letter dated 22 February 2000 which was addressed to the third appellant and which the learned Judicial Commissioner said had described how the first respondent had tried applying without success for the 15,000 acres of land from the State Government between 1998 and 1999, even though certain verbal assurances were given by JTU on the matter;

(b) a letter dated 4 July 2000 addressed to the second appellant advising that the first respondent had been requested to prepare a cabinet paper for consideration on what would happen to the first respondent's shares in the third appellant if the State Government failed to alienate the land;

(c) a letter dated 18 September 2003 addressed to the second appellant, requesting the second appellant to furnish the first respondent with tables A, B and C referred to in the second appellant's letter of 20 May 2003 so as to enable the first respondent to prepare the cabinet papers.

[28] The learned Judicial Commissioner found that none of the letters written by the first respondent amounted to an unequivocal acknowledgement or an admission of the liability of the third respondent within the meaning of s. 19 of the Sabah Limitation Ordinance.

[29] We again find no error in what the learned Judicial Commissioner said. His findings were based on the evidence led before him and it was not demonstrated to us that the learned Judicial Commissioner's appreciation of the evidence was flawed in any way. We should also point out that the last letter written by the first respondent between 17 April 1998 and 17 April 2004 is the letter dated 18 September 2003. Therefore even if the three letters referred to by the learned Judicial Commissioner can be regarded as an unequivocal acknowledgement of the third respondent's liability under the letter of undertaking, it would have extended the limitation period from the date of the last letter ie, from 18 September 2003 until 18 September 2009. This action was filed on 17 March 2010 which was still outside the last date to do so on 18 September 2009.

[30] The appellants next contended that their suit was not caught by limitation as s. 23 of the Sabah Limitation Ordinance provides that where there is a continuing breach of contract, a fresh period of limitation begins to run at every moment of time during which the breach continues. According to the appellants the failure of the third respondent to alienate the 15,000 acres of land constitutes a continuing breach.

[31] We do not agree. In our view this is not a case where the third respondent had promised to perform a continuous act. Here the third respondent only promised to perform one act, namely, the alienation of 15,000 acres of land by 17 April 1995. When the third respondent failed to do so, it was in breach of its promise to perform that one act. There was accordingly no continuing breach of contract as alleged by the appellants.

[32] The respondents also contended that there were events which extended the period of limitation, such as the first respondent informing the appellants in the first respondent's letter of 3 December 2007 about the setting up of an *ad hoc* committee by the respondents to study the appellants' claim and consideration of other alternatives for an amicable settlement. The appellants relied on the case of *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10 as the authority for this proposition. We find no merit in this contention. The case of *KEP Mohamed Ali* was a case concerning s. 26(2) of the West Malaysian Limitation Ordinance 1953 which allows an acknowledgement to be made even after limitation has set in, whereas under s. 19 of the Sabah Limitation Ordinance, the acknowledgement must be made before limitation has set in. As the learned Judicial Commissioner pointed out in his judgment, such letters were written by the respondents after 17 April 2004.

Was The First Respondent An "Agent"

[33] Reverting now to the question whether the first respondent was an agent of the second and third respondents for the purposes of s. 19 of the Sabah Limitation Ordinance, the learned Judicial Commissioner found that the first respondent was not, as the first respondent was a statutory body created by the Koperasi Pembangunan Desa Sabah Enactment 1981 and being a statutory body was a different entity from and does not form part of nor represent the government. The learned Judicial Commissioner found the first respondent as neither a servant nor agent of the second or third respondent. The learned Judicial Commissioner relied on several case law on the point including *Padu Ehsan Sdn Bhd v. Binaan Johanesa Sdn Bhd and Perbadanan Kemajuan Negeri Melaka (Garnishee)* [1994] 2 CLJ 69.

[34] The appellants contended that the first respondent was an agent of the second and third respondents and that it is not necessary that there should be a formal appointment in writing of the first respondent as "agent" as the appointment may be implied or inferred from conduct and the surrounding circumstances (see *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611; [1996] 1 MLJ 233 and *Wright v. Pepin* [1954] 1 WLR 635).

[35] We agree with the appellants that there does not need to be a formal appointment in writing of the first respondent to constitute the first respondent as agent of the second and third respondents, but explanation 2 of s. 19 of the Sabah Limitation

Ordinance makes it clear that for the purposes of the section the agent must be "duly authorized in that behalf". The question is, was the first respondent duly authorised in that behalf?

[36] The appellants say it was as the sale of shares agreement dated 17 April 1995 recognises the material role played by the first respondent in the submission of a cabinet paper to the third respondent on the restructuring; that it was the first respondent who conveyed to the first appellant the third respondent's approval of the restructuring, and the first respondent had written letters such as that of 23 July 1996 to the second respondent in which a letter dated 17 July 1996 was attached. The attached letter dated 17 July 1996 was from the first respondent to the Chief Minister, Sabah requesting the latter's assistance to have the 15,000 acres of land transferred in fulfilment of the condition of the agreement and attaching two maps for that purpose. According to the appellants this shows that the first respondent is not only the agent of the third respondent but had in fact synchronised the third respondent's obligation in the letter of undertaking and the first respondent's obligation in the sale of shares agreement as one.

[37] We do not agree with the appellants' contention. It must not be overlooked that the first respondent was a party to the sale of shares agreement. In our view the fact that the first respondent had done all the things pointed out by the appellants shows a definite keenness or desire on its part to give effect to the agreement and to see it succeed. In the circumstances the acts of the first respondent are equivocal and cannot be attributed only to wanting to acknowledge the liability of the second and third respondents under the letter of undertaking. Even further still, in our view, there is nothing in what the first respondent is said to have done which suggests that the first respondent had been "duly authorized in this behalf" by the second or third appellant. As we indicated earlier, the first respondent was doing what it did as a signatory to the sale of shares agreement. We accordingly agree with the learned Judicial Commissioner that the first respondent was not an agent of the second and third respondents within the meaning of s. 19 of the Sabah Limitation Ordinance.

A **The First Respondent's Counter-claim**

[38] The appellants contended that given the fact that the 15,000 acres of land had not been alienated to Newco or the third appellant, it was not unreasonable for the appellants to propose
B that any dividend payable to the first respondent from the profits of the third appellant be set-off against the obligation due under the letter of undertaking of the second respondent. The appellants contended that since the first and second respondents agreed to this they are now estopped from making
C their counter-claim.

[39] We do not agree. The learned Judicial Commissioner found that at the material time in 2008 when the dividend in the third respondent was declared, the liability under the letter of undertaking was already statute barred and so there were no
D liabilities which could be set-off (see *United Malayan Banking Corporation Bhd v. PTL Marketing Services Sdn Bhd & Ors* [2004] 2 CLJ 152). Even further still, the learned Judicial Commissioner held that at the material time, the appellants and the respondents had not agreed nor quantified the amount of compensation to be
E paid for the alleged liability under the letter of undertaking.

[40] We agree with the findings of the learned Judicial Commissioner. We see no error in what he held. In our view once the dividend was validly declared by the third appellant, it is a
F debt owed by the company to its members and immediately payable unless it was stipulated in the declaration that the dividend will be payable at a later date (see Walter Woon, *Company Law*, 2nd edn 1997, at p. 614). The learned Judicial Commissioner was correct to grant the first respondent judgment for that sum.

G **Whether The First Respondent Ought To Indemnify The Appellants**

[41] The appellants contended that under cl. 8(iii) of the sale of
H shares agreement, the first respondent had agreed to keep the first and third appellants fully and effectively indemnified:

(i) against any depletion and diminution of the assets of the third appellant; and

I (ii) any loss or damage which the first appellant may directly or indirectly suffer as a result of or in connection with any misrepresentation contained in or any breach of any of the warranties and undertakings set out in the agreement.

[42] It is the appellants' submission that there was a depletion of the third appellant's assets when the 15,000 acres of land was not alienated to it which in turn constitutes a breach of the undertaking for which the appellants would be entitled to be paid compensation for which the first respondent must now indemnify the appellants in respect of.

[43] We do not agree. In the first place the 15,000 acres was never alienated to the third appellant or Newco, so we do not see how it can be regarded as an asset of the company. In the second place, it is our view that the first respondent's only obligation with regard to the letter of undertaking was to secure the same from the State Government of Sabah, which it has done. We can see no provision in the sale of shares agreement which requires the first respondent to ensure that the State Government not only issues the letter of undertakings but also ensures that the State Government fulfils its undertaking.

[44] We accordingly find no basis in law for the indemnity claimed by the appellants.

[45] It was for all the above reasons that we dismissed the appeal of the appellants and affirmed the decision of the High Court, with costs of RM30,000. The deposit was to be refunded.